

FEB 12 1992

OFFICE OF THE CLERK

No. 91-860

In The
Supreme Court of the United States

October Term, 1991

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Appellants,

vs.

THE STATE OF MONTANA, et al.,

Appellees.

*On Appeal From The United States District Court
For The District Of Montana*

BRIEF AMICI CURIAE OF THE CROW TRIBE OF
INDIANS, CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S
RESERVATION, BLACKFEET TRIBE OF THE BLACKFEET
RESERVATION, GROS VENTRE AND ASSINIBOINE
TRIBES OF THE FORT BELKNAP INDIAN COMMUNITY,
THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, AND THE NORTHERN
CHEYENNE TRIBE

IN SUPPORT OF APPELLEES
STATE OF MONTANA, ET AL.

Dale T. White*
FREDERICKS, PELCYGER & HESTER
1881 9th Street, Suite 216
Boulder, Colorado 80302
Telephone: (303) 443-1683

February, 1992

*Counsel of Record for all Amici

1992

JEANNE S. WHITEING
WHITEING & THOMPSON
1136 PEARL STREET, STE. 203
BOULDER, CO 80302
(303) 444-2549
*Counsel for the Blackfeet Tribe
of the Blackfeet Reservation*

JAMES L. VOGEL
P.O. DRAWER H
HARDIN, MT 59034
(406) 665-3900
*Counsel for the Fort Belknap
Indian Community*

DANIEL F. DECKER
CONFEDERATED SALISH &
KOOTENAI TRIBES
LEGAL DEPARTMENT
P.O. BOX 278
PABLO, MT 59855
(406) 675-4700
*Counsel for the Confederated
Salish and Kootenai Tribes*

HAROLD A. MONTEAU
MONTEAU, GUNTHER & DECKER, P.C.
410 CENTRAL AVENUE, SUITE 522
GREAT FALLS, MT 59401
(406) 452-9955
*Counsel for the Chippewa Cree Indians
of the Rocky Boy's Reservation*

CALVIN WILSON
BUSBY, MT 59016
(406) 592-3582
*Counsel for the Northern
Cheyenne Tribe*

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. INDIAN TRIBES ARE ESPECIALLY DEPENDENT UPON CONGRESSIONAL REPRESENTATION.	4
II. MONTANA AND MONTANA INDIAN TRIBES WILL BE SEVERELY AND ADVERSELY AFFECTED BY THE REAPPORTIONMENT	10
CONCLUSION	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
In re Heff, 197 U.S. 488 (1905)	4
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) .	4
State of Montana v. Department of Commerce, 775 F.Supp. 1358 (D. Mont. 1991)	2
Talton v. Mayes, 163 U.S. 376 (1896)	4
United States v. Wheeler, 435 U.S. 313 (1978)	4
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)	4
Winton v. Amos, 255 U.S. 373 (1921)	4
 <u>Statutes</u>	
25 U.S. §§450-450n, Indian Self- Determination Act of 1975	5
25 U.S.C. §§1301-1341, Indian Civil Rights Act	5
25 U.S.C. §§1451-1543, Indian Financing Act of 1974	5
Pub. L. 91-264, May 22, 1970, 84 Stat. 260, 25 U.S.C. §641	6
Pub. L. 92-312, June 14, 1972, 86 Stat. 216, 25 U.S.C. §§668-670	6
Pub. L. 95-195, November 18, 1977, 25 U.S.C. §§711-711f, 91 Stat. 1415	7

Statutes, continued

Page

Pub. L. 95-328, July 28, 1978, 92 Stat. 409, Water Rights Settlement Act for Ak-Chin Indian Community	8
Pub. L. 96-420, October 10, 1980, 94 Stat. 1785, 25 U.S.C. §§1721-1735, Maine Indian Claims Settlement Act	8
Pub. L. 97-293, October 12, 1982, 96 Stat. 1274, Papago Indian Water Rights Settlement Act	8
Pub. L. 97-429, January 8, 1983, 96 Stat. 2269, 25 U.S.C. §§1300b-11 to 1300b-16	7
Pub. L. 98-134, October 18, 1983, 95 Stat. 852, 25 U.S.C. §§1751-1760, Connecticut Indian Land Claims Settlement Act	8
Pub. L. 100-89, Title I, August 18, 1987, 101 Stat. 666, U.S.C. §§1300g-1300g-7	7
Pub. L. 100-95, August 18, 1987, 101 Stat. 704, 25 U.S.C. §§1771-1771i, Massachusetts Indian Land Claims, Settlement Act	8
Pub. L. 100-228, December 31, 1987, 101 Stat. 1556, 25 U.S.C. §§1772-1772g, Seminole Indian Land Claims Settlement Act	8
Pub. L. 100-420, September 8, 1988, 102 Stat. 1577, U.S.C. §§1300h-1300h-8	7
Pub. L. 100-512, October 20, 1988, 102 Stat. 2549, 25 U.S.C. §§1772-1772g, Salt River Pima-Maricopa Indian Community Water Rights Settlement Act	9

Statutes, continued

Page

Pub. L. 100-585, November 3, 1988,
102 Stat. 2973, Colorado Ute Indians
Water Rights Settlement Act of 1988 9

Pub. L. 100-675, November 17, 1988,
102 Stat. 4000, San Luis Rey Indian
Water Rights Settlement Act 9

Pub. L. 101-41, June 21, 1989,
103 Stat. 83, 25 U.S.C. 1773-1773j,
Washington Indian (Puyallup) Land
Claims Settlement Act 9

Pub. L. 101-484, October 31, 1990,
104 Stat. 1167, 25 U.S.C. §§983-983h 7

Pub. L. 101-503, November 3, 1990,
104 Stat. 1292, U.S.C. §§1774-1774h,
Seneca Nation (New York) Land
Claims Settlement Act 9

Pub. L. 101-618, November 16, 1990,
104 Stat. 3289, Fallon Paiute Shoshone
Indian Tribes Water Rights Settlement
Act and Truckee-Carson-Pyramid Lake
Water Rights Settlement Act 9

Other Authorities

Getches & Wilkinson, Federal Indian Law,
(1986 Ed.) 11

INTEREST OF AMICI CURIAE

Amici curiae¹ are federally-recognized
American Indian tribes located within the State
of Montana.²

In total, the 1990 U.S. Census identifies
18,675 Indians living on seven Indian
Reservations in Montana. The total Indian
population within the State according to the
1990 Census is 47,524. This constitutes

¹ Counsel for Appellants and Appellees
have consented to the filing of the brief of
amici Tribes. The written consents are
submitted for filing herewith.

² The amici Tribes are the Crow Tribe,
the Chippewa Cree Tribe of the Rocky Boy's
Reservation, the Blackfeet Nation, the Gros
Ventre and Assiniboine Tribes of the Fort
Belknap Indian Reservation, the Confederated
Salish and Kootenai Tribes of the Flathead
Reservation, and the Northern Cheyenne Tribe.
According to the 1990 U.S. Census, 6,370
persons reside within the Crow Reservation;
4,724 are American Indians; 1,954 persons
reside on the Rocky Boy's Reservation, 1,882
are Indians; 8,549 persons reside on the
Blackfeet Reservation, including 7,025 Indians;
2,508 persons reside on the Fort Belknap
Reservation, 2,338 are Indians; 21,259 persons
reside within the Flathead Reservation, 5,130
are Indians; 3,923 persons reside on the
Northern Cheyenne Reservation, 3,542 are
Indians.

approximately 5.9% of the total state population of 803,655. Amici tribes have a substantial interest in the issues raised in this case. Reapportionment of the United States House of Representatives will result in the State of Montana losing one of its two representatives and reducing the State's representatives by 50% from two to one. As noted by the three judge district court panel below, the proposed reapportionment of Montana as a single district would contain the "largest number of persons per representative in any district" among all states. State of Montana v. Department of Commerce, 775 F.Supp. 1358, 1362 n.1 (D. Mont. 1991). With a population of 803,655, Montana would become a congressional district 40 percent larger than the ideal district size of 572,466. (Mot. to Aff. at App. 14.)

SUMMARY OF ARGUMENT

Upholding the reapportionment of the United States House of Representatives would

result in the State of Montana losing one of its existing two representatives. This 50% reduction will be harmful to the amici tribes. At present, it is difficult for Montana's Tribes to be heard effectively in Congress with two representatives. It is especially important for Indian tribes to have adequate representation in Congress because of the plenary authority of Congress over Indian affairs. Over the course of history, and especially over the past twenty-five years, Congress has passed numerous special laws to protect specific Indian tribes and to fulfill the government's responsibility to those tribes. The ability of Montana's Tribes to secure favorable legislation from Congress will be severely impaired if Montana's representation is reduced from two congressmen to one.

Amici submit this Brief to urge the Court to find that the proposed reapportionment is invalid.

ARGUMENT

I. INDIAN TRIBES ARE ESPECIALLY DEPENDENT UPON CONGRESSIONAL REPRESENTATION.

Indian tribes are extremely dependent upon Congress. This Court has repeatedly held that Congress has "plenary authority to legislate for the Indian tribes in all matters." United States v. Wheeler, 435 U.S. 313, 319 (1978), citing Winton v. Amos, 255 U.S. 373, 391-392 (1921); In re Heff, 197 U.S. 488, 498-499 (1905); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); and Talton v. Mayes, 163 U.S. 376, 384 (1896). In Wheeler, the Court described this as an "all-encompassing power." 435 U.S. at 319. "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl.3." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).³ As a consequence of this power, Indian tribes rely on Congress to a greater

³ While tribes are subject to Congress' plenary power, "until Congress acts, the tribes retain their existing sovereign powers." United States v. Wheeler, 435 U.S. at 323.

extent than any other group.

Over the past twenty-five years, Congress has pursued a policy of promoting tribal self-government and self-determination for Indian tribes in general. Indian tribes such as the amici have increasingly relied upon Congress to obtain the necessary assistance to improve conditions on their reservations in the areas of economic development, health, environmental protection and law and order. This has included general Indian legislation such as the Indian Civil Rights Act, 25 U.S.C. §§1301-1341, which acknowledged the existence and authority of tribal governments, the Indian Financing Act of 1974, 25 U.S.C. §§1451-1543, which provided a means for tribes to enhance their reservation economies, and the Indian Self-Determination Act of 1975, 25 U.S. §§450-450n, providing tribes with the opportunity to administer and control their own governmental programs.⁴

⁴ See also the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963, the Indian Alcohol and Substance Abuse Prevention and

These statutes benefit tribes on a national level. But, in addition to general Indian legislation, in recent years Congress has increasingly enacted legislation dealing specifically with individual Indian tribes, on a tribe-by-tribe basis. Examination of Title 25, U.S. Code, shows a dramatic increase over the past twenty-five years in federal legislation dealing specifically with individual Indian tribes. In Title 25 of the United States Code, from §495 through §1300 there are seventy-five subchapters, each of which specifically addresses either individual Indian tribes or Indian tribes within a particular state. See, for example, Pub. L. 91-264, May 22, 1970, 84 Stat. 260, 25 U.S.C. §641 (providing Hopi Tribe with certain powers of self-determination with respect to industrial park); Pub. L. 92-312, June 14,

Treatment Act of 1986, 25 U.S.C. §§ 2401-2478; the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 and the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013.

1972, 86 Stat. 216, 25 U.S.C. §§668-670 (governing sale and mortgage of Southern Ute Tribe lands in Colorado); Pub. L. 95-195, November 18, 1977, 25 U.S.C. §§711-711f, 91 Stat. 1415 (restoration of Federal supervision over Siletz Indian Tribe of Oregon); Pub. L. 97-429, January 8, 1983, 96 Stat. 2269, 25 U.S.C. §§1300b-11 to 1300b-16 (provision of federal services to Texas Band of Kickapoo Indians); Pub. L. 100-89, Title I, August 18, 1987, 101 Stat. 666, U.S.C. §§1300g-1300g-7 (restoration of federal supervision of Ysleta del Sur Pueblo); Pub. L. 100-420, September 8, 1988, 102 Stat. 1577, U.S.C. §§1300h-1300h-8 (reaffirming federal supervision Lac Vieux Desert Band of Lake Superior Chippewa Indians); Pub. L. 101-484, October 31, 1990, 104 Stat. 1167, 25 U.S.C. §§983-983h (restoration of rights and privileges of the Ponca Tribe of Nebraska).⁵

⁵ Congress has also increasingly dealt with tribes on an individual basis in terms of budget appropriations. See Pub. L. 102-154,

A number of recent Indian laws have dealt with settlement of water and land disputes, providing for significant economic development funds for those tribes and recovery of tribal aboriginal lands and quantification of tribal water rights. See, Pub. L. 95-328, July 28, 1978, 92 Stat. 409, Water Rights Settlement Act for Ak-Chin Indian Community; Pub. L. 96-420, October 10, 1980, 94 Stat. 1785, 25 U.S.C. §§1721-1735, Maine Indian Claims Settlement Act; Pub. L. 97-293, October 12, 1982, 96 Stat. 1274, Papago Indian Water Rights Settlement Act; Pub. L. 98-134, October 18, 1983, 95 Stat. 852, 25 U.S.C. §§1751-1760, Connecticut Indian Land Claims Settlement Act; Pub. L. 100-95, August 18, 1987, 101 Stat. 704, 25 U.S.C. §§1771-1771i, Massachusetts Indian Land Claims Settlement Act; Pub. L. 100-228, December 31, 1987, 101 Stat. 1556, 25 U.S.C. §§1772-1772g, Seminole Indian Land Claims Settlement Act;

November 13, 1991, 105 Stat. 990-1038, Department of the Interior and Related Agencies Appropriations Act, 1992.

Pub. L. 100-512, October 20, 1988, 102 Stat. 2549, 25 U.S.C. §§1772-1772g, Salt River Pima-Maricopa Indian Community Water Rights Settlement Act; Pub. L. 100-585, November 3, 1988, 102 Stat. 2973, Colorado Ute Indians Water Rights Settlement Act of 1988; Pub. L. 100-675, November 17, 1988, 102 Stat. 4000, San Luis Rey Indian Water Rights Settlement Act; Pub. L. 101-41, June 21, 1989, 103 Stat. 83, 25 U.S.C. 1773-1773j, Washington Indian (Puyallup) Land Claims Settlement Act; Pub. L. 101-503, November 3, 1990, 104 Stat. 1292, U.S.C. §§1774-1774h, Seneca Nation (New York) Land Claims Settlement Act; Pub. L. 101-618, November 16, 1990, 104 Stat. 3289, Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act and Truckee-Carson-Pyramid Lake Water Rights Settlement Act.⁶

⁶ The Tribes in Montana are especially interested in this latter category of legislation since their federally-reserved water rights are currently subject to a state-wide adjudication in Montana which has, and will, require federal legislation for settlement. See, Mont. Code Ann. §85-2-702;

Based upon this trend towards specific tribe-by-tribe legislation, it is extremely important that the amici tribes in Montana retain Montana's existing two seats in the House of Representatives.

II. MONTANA AND MONTANA INDIAN TRIBES WILL BE SEVERELY AND ADVERSELY AFFECTED BY THE REAPPORTIONMENT.

The reduction of representatives from two seats to one, a 50% reduction, is the largest and most dramatic reduction possible so long as each state is guaranteed at least one seat. At present, only six other states have one representative.⁷ Montana, along with six other states,⁸ currently has two representatives. This is in contrast to states like California and New York which have 45 and

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); and Fort Peck-Montana Compact, Mont. Code, Title 85, Ch. 20, Part 2.

⁷ Alaska, Delaware, South Dakota, North Dakota, Vermont and Wyoming.

⁸ The other six states are Hawaii, Idaho, Maine, Nevada, New Hampshire and Rhode Island.

34 representatives respectively. A loss of one seat would affect these larger states by 2% and 3% respectively. Even the State of Washington, which stands to gain one seat from the new reapportionment, currently has eight seats and would not be affected nearly as much as Montana would be by the loss of one of its two seats. A loss of one seat for the State of Washington would represent a reduction of only 12.5%.

One of the groups that will be especially hard hit by the reduction is Montana's Indian population. Based upon the 1990 U.S. Census, the American Indian population in Montana is approximately 5.9% of the total State population. Examination of 1980 U.S. Census figures shows that the Indian population has increased by 10,000 over the past ten years and the percentage of Indian to total population has increased by approximately 1.2%. See and compare, Getches & Wilkinson, Federal Indian

Law, (1986 Ed.) 6-7.⁹ Thus, while Montana's overall population has decreased, according to the 1990 U.S. Census, the number of Indians residing within the State has increased. The proposed reduction in representatives is thus especially damaging to the Indian population within the State.

Amici urge this Court to adopt a standard governing congressional reapportionment which takes account of the impacts of the proposed redistribution of power between the states. Reapportionment should not pass constitutional muster where, as here, there is not only a major disparity in population between congressional districts but in addition that disparity significantly and disproportionately diminishes the congressional representation of one state vis-a-vis the others. This rule should be applied especially where the

⁹ According to these figures, based upon the 1980 U.S. Census, Montana had an Indian population of 37,270 in 1980, which represented 4.7% of the total state population. Getches & Wilkinson, Federal Indian Law, (1986 Ed.) 6-7.

disparity can be reduced by use of a different apportionment formula.

For these reasons, it is very important that amici have adequate representation in the halls of Congress. Without this representation, the Tribes will not be able to obtain the legislation they need to obtain self-determination and self-governance.

CONCLUSION

For the reasons stated above, the decision of the three judge district court holding that the reapportionment is invalid should be affirmed.

Respectfully submitted,

Dale T. White*
FREDERICKS, PELCYGER & HESTER
1881 9th Street, Suite 216
Boulder, Colorado 80302
Telephone: (303) 443-1683

* Counsel of Record for all Amici